BEFORE THE

Federal Communications Commission

In the Matter of	)	
	)	
Petition for Declaratory Ruling	)	MM Docket No. 92-254
Concerning Section 312(a)(7) of	)	
the Communications Act	)	

COMMENTS OF LOUISIANA TELEVISION BROADCASTING CORP.

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SUMMARY

Candidates for public office utilizing the broadcast media for dissemination of their messages have no unconditional right either under the Communications Act or by virtue of the First Amendment to broadcast uncensored messages which are or may be legally actionable under 18 U.S.C. § 1464. The congressional scheme for use of the broadcast media for political purposes contemplates limitations upon that use that are reasonably related to the goal of allowing the media to be used for political purposes yet preventing its illegal use. Deciding what may be obscene or indecent in a political broadcast ad requires the exercise of individual licensee journalistic judgment. Governmental review of those decisions should only be for abuse of discretion: to see that the licensee has acted in a reasonable good faith manner. The licensees good faith can be tested to assure that its decision is politically neutral and has not been made to advance or retard the candidacy of any individual or to suppress a particular point of view.

No rational distinction can be made with respect to the review of the licensee's acceptance or rejection of a political ad based upon whether it is for a federal or non-federal candidate. In both cases, the role of the Commission in reviewing the exercise of that discretion should remain the same. The suggestion that political broadcast messages which contain indecent or obscene material may be channeled to time periods when children are not likely to be in

the audience is not a satisfactory means of implementing a licensee's good faith judgment that broadcast of such material is inappropriate at any time. Similarly, the suggestion that such ads may be labelled with a warning to alert viewers and listeners about the nature of the message is insufficient to protect the public from the impact of the particular message and is not consistent with the ban on such material contained in 18 U.S.C. § 1464. The Commission should not attempt to determine whether a particular message is legally actionable or await an adjudication of whether there has been a criminal violation of 18 U.S.C. § 1464. So long as the licensee believes in good faith that the material could fall within the prescriptions of 18 U.S.C. § 1464, that judgment should be respected.

The Commission should adopt procedures that limit its oversight of the exercise of licensee discretion to accept or reject political ads to avoid serious questions regarding the constitutionality of the Communications Act. The rationale for treating the journalistic First Amendment rights of broadcasters differently from the First Amendment journalistic rights of the print media is not settled. Indeed, the number and quality of media outlets now available to the public has sapped vitality out of the Supreme Court's opinion in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) and serious questions with respect to its continued applicability can be avoided only if the Commission

accepts a limited scope of review with respect to the exercise of broadcaster discretion.

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Louisiana Television Broadcasting Corp. (hereinafter "LTBC"), licensee of television broadcast Station WBRZ-TV, Baton Rouge, Louisiana, herewith submits its Comments in the above-referenced matter. LTBC's interest in this proceeding derives from the fact that it declined to carry certain political broadcast ads graphically depicting dead fetuses and aborted fetal parts on behalf of a 1992 mayoral candidate in Baton Rouge. Its interest therefore reflects that controversy and the fact that it then received a letter of inquiry from the FCC based upon its refusal to carry such abortion ads, a matter now pending with the Commission. Attached to this pleading as Exhibit A is the complaint filed on behalf of the mayoral candidate in Baton Rouge, the Commission's letter to LTBC, and the station's reply thereto as well as the complainant's further submission. Review of the circumstances surrounding that particular controversy is necessary to understand the positions advocated by LTBC in this proceeding

and the reason why it urges the Commission to interpret the statutory provisions of the Communications Act of 1934 in a manner which leaves to the good faith and reasonable discretion of licensees whether to decline to carry, at any time of the broadcast day or night, advertisements for federal or non-federal candidates that are arguably obscene or indecent or to channel them to particular time periods. In further support of LTBC's position herein, the following is submitted.

The Commission's "Public Notice/Request for Comments" (hereinafter "Notice") arises out of the conflicting provisions of the Communications Act that impose on broadcasters seemingly inconsistent obligations: to carry political advertising and not to censor the same, under Section 315; to provide reasonable access for federal candidates, under Section 312(a)(7); and yet, not, under Section 312(a)(6), to broadcast, upon pain of possible license revocation, programming that results in a violation of 18 U.S.C. § 1464, and which prohibits the broadcast of "obscene, indecent or profane language by means of radio communication." In an Order released October 30, 1992 in Gillett Communications of Atlanta, Inc. d/b/a WAGA-TV5 v. Becker, by the U.S. District Court for the Northern District of Georgia (hereinafter the "WAGA-TV" case), a court held for the first time that certain anti-abortion ads were legally indecent and that a broadcast licensee could channel such political broadcasts to hours where children may not be in the audience. The Commission has indicated in this Notice

and in a companion letter of the same date to Daniel Becker that broadcasters may channel those political ads they consider indecent pending further Commission action on this declaratory ruling request. At this juncture the Commission has asked for comment

> on all issues concerning what, if any, right or obligation a broadcast licensee has to channel political advertisements that it reasonably and in good faith believes are indecent. We also seek comment as to whether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children. In this latter respect, we specifically invite commenters to address the proper scope of any such right and the standard by which the Commission should evaluate the reasonableness of broadcasters' judgments rendered in exercising that right.

Simply put, in LTBC's view, the essential questions are (1) whether any candidates for public office (federal or non-federal) have statutory access to broadcast facilities to air arguably criminal materials at any time of the day or night and (2) whether and how broadcast licensees may act as gatekeepers to channel or ban such broadcasts even when contained within material submitted by or on behalf of political candidates. Unlike the Supreme Court's formulation of the issue in FCC v. Pacifica Foundation, 438 U.S. 723, 744 (1978) (whether "the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances"), the question here is whether Congress intended to and can not merely restrict, but require the public broadcast of indecent or obscene language and/or pictures. LTBC submits that consistent with the congressional scheme and

applicable First Amendment principles, broadcasters must be allowed in good faith to exercise editorial discretion to decline to carry such indecent or obscene programming.

LTBC supports the legal conclusions contained in Chairman Fowler's letter, the FCC staff memo of January 19, 1984 and the WAGA-TV decision and urges the full Commission to adopt those views now. For the reasons set forth in those letters and decisions, it is reasonable to conclude that Congress never intended to allow the process of political communication on the broadcast media to proceed without regard to other federal values or interests. Although a total ban on political speech in broadcasting would raise serious constitutional issues,[1/] reasonably qualified access to the medium for such messages may be an appropriate constitutional choice.[2/] At the moment, it is the one that Congress has made. LTBC urges the Commission to consider the additional grounds set forth here in support of Chairman Fowler's 1984 position and now adopted by the WAGA-TV District Court Order.

I. The First Amendment Protection of Political Speech Is Not Unlimited.

While the First Amendment of the U.S. Constitution affords significant protection for political speech, Arlington County Republican Comm. v. Arlington County, 790 F. Supp. 618 (E.D. Va. 1992) the Supreme Court "has never approved a general right of

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1/ Cf. FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

2/ But see n.14 infra, p. 27.

access to the media," CBS, Inc. v. FCC, 453 U.S. 367, 398 (1981) (citations omitted). To the contrary, narrowly tailored restrictions on political speech which serve important governmental interests are allowed. Outside of the broadcasting context, federal courts have frequently found that statutes limiting candidates' campaign activities are constitutional, even though the statutes inhibit candidates' First Amendment rights. See, e.g., Burson v. Freeman, 112 S. Ct. 1846 (1992) (Tennessee statute prohibiting solicitation of votes and display of campaign material within 100 feet of entrance to polling place found constitutional); Pestrak v. Ohio Elections Comm'n, 926 F.2d 573 (6th Cir. 1991), cert. denied, 112 S. Ct. 672 (1992) (Ohio statute prohibiting knowing dissemination of falsehood about other candidate found constitutional); Geary v. Renne, 914 F.2d 1249 (9th Cir. 1990), reh'g granted, 924 F.2d 175 (9th Cir. 1991) (California statute allowing state to remove false, misleading or inconsistent materials submitted by candidates for a voters' information pamphlet published by California found constitutional); Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), cert. denied, 431 U.S. 913 (1977) (provision of city statute limiting the size of campaign signs was constitutional, although other provisions of the statute were not).

The government may regulate the time, place or manner of expressive activity, such as campaigning, taking place in a "public forum,"[3/] as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternatives for communication. Burson, 112 S. Ct. at 1850; Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). The government may also constitutionally adopt a content-based restriction -- such as the Tennessee statute prohibiting all campaign speech or displays within 100 feet of a polling place -- if the restriction is necessary to serve a compelling government interest and is narrowly drawn to achieve that end. Burson, 112 S. Ct. at 1851.

II. The "No Censorship" Prohibition Of Section 315 Does Not Preclude a Licensee From Conditioning Access to Broadcast Time on Compliance With Other Reasonable Restrictions on Political Speech.

Like non-broadcast political speech governed by First Amendment considerations, the Communications Act makes available the right to broadcast political messages but properly imposes obligations both upon the candidate and the broadcast station with respect to such access. All candidates can be required to pay for air time and are entitled to lowest unit rate privileges only in specified periods before primaries or general elections. Non-

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3/ A "public forum" is defined as a place "which by long tradition or by government fiat ha[s] been devoted to assembly and debate." Perry Educational Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Section 315(a) of the Communications Act appears to designate campaign advertisements aired by broadcasters as a modern public forum.

federal candidates have no initial right of access and federal candidates have only a "reasonable" right to purchase air time. A right to respond to a political appearance of an opponent (federal or non-federal) must be asserted within seven days of that appearance or the second candidate loses the opportunity to respond over the air. Similarly, no candidate, as far as we can determine from any reported case, can assert a right to appear on a broadcast station and withhold identification of the person or entity that is paying for the message that is being broadcast. See Application of Sponsorship Identification Rules to Political Broadcasts, 66 F.C.C.2d 302 (1977). Sponsorship identification of the sponsoring party under Section 317 of the Communications Act enhances the First Amendment value of political speech by informing listeners of who is paying for the message to which they have been subjected. At the same time it limits what might otherwise be the candidate's choice not to highlight or disclose such information. The various exceptions to equal time in Section 315 also condition in significant ways the right of reply or access that political candidates may obtain to appearances by their opponents. The exemptions to equal time appearances for bona fide newscast, interviews, documentaries, on-the-spot coverage of news events, debates and press conferences[4/] are all examples of qualifications

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4/ See Aspen Institute, 55 F.C.C.2d 697 (1975); aff'd sub nom. Chisholm v. FCC, 538 F.2d 349 (D.C. Cir. 1976); cert. denied, 429 U.S. 890 (1976).

(in effect, total censorship) upon the right of access under Section 315.

It is, therefore, a substantial overstatement of the purpose and thrust of the no-censorship provision of Section 315 to consider it breached in unacceptable ways by reading into the provision a right of a licensee to take account, not only of the above specific limitations on access and no-censorship contained in Sections 315 and 312(a)(7), but the corollary duty under Section 311(a)(6) not to broadcast obscene, indecent or profane material. A proper reading of these sections of the Communications Act is that the no-censorship provision is intended to enhance the right of a candidate to have its political message broadcast, but only with due regard to other important interests within the statute.

FCC sanction of a broadcaster's refusal to air political advertisements where the station reasonably believes that airing these advertisements would violate criminal law -- such as the obscenity and indecency restrictions of 18 U.S.C. § 1464 -- survives exacting First Amendment scrutiny, because it is a reasonable restriction on the manner of campaigning. First, government approval of such licensee refusals would be content neutral because it would not prohibit public discussion of an entire topic or viewpoint, nor would it be based upon government disagreement with a particular message. See Burson, 112 S. Ct. at 1850; Ward v. Rock Against Racism, 491 U.S. at 791; Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530, 537

(1980). Candidates could continue to express their opinions on issues such as abortion in broadcast advertisements, they just could not do so in a manner which might violate federal criminal statutes.[5/] The constitutional dimension of political speech in a public forum is substantial but does not encompass the right to engage in criminal behavior.[6/] Dancing nude in public to convey a political message regarding government funding of the arts or undertaking to organize a lynching in a public park to make a campaign point is not immune from prosecution for that reason. See Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upheld a prohibition against camping in certain public parks, even though camping was intended as demonstration on behalf of the homeless); Kovacs v. Cooper, 336 U.S. at 77 (upheld an ordinance prohibiting the broadcast of loud and raucous noises by a sound truck). Just as the government may limit the decibels on a sound truck, it may also limit the intrusiveness or "volume" of obscene or indecent political advertisements. In both cases, only the manner in which the message is conveyed, and not the message itself, is affected. Cf. Barnes v. Glen Theatre, Inc., 111 S. Ct.

5/ In the case of the six anti-abortion ads submitted to WBRZ-TV in the 1992 Baton Rouge mayoral campaign, LTBC rejected four and offered to broadcast two that did not contain graphic depiction of dead fetuses and fetal parts. The station also covered in its news programs anti-abortion views of the mayoral candidate, as well as the controversy surrounding its rejection of certain of the ads.

6/ The FCC itself has recognized the latitude a licensee may have to reject political speech which, because of a direct appeal, represents a "clear and present danger of imminent violence." Atlanta NAACP, 36 F.C.C.2d 635, 637 (1972).

2456 (1991) ("the requirement that dancers don pasties and a G-string [rather than dance in the nude] does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic").

In addition, the government has substantial interests in encouraging compliance with its criminal statutes. Section 312(a)(6) is designed to enlist broadcasters in that effort. If individuals could sidestep criminal restrictions by qualifying as candidates for federal office, the authority of the government's criminal statutes would be called into question. The Supreme Court has found that the government can constitutionally regulate the broadcast of obscene,[7/] indecent or patently-offensive speech in order to protect the individual's right to be left alone in the privacy of the home and to protect the well-being of children who have unique access to broadcast messages. FCC v. Pacifica Foundation, 438 U.S. at 748-49; see also Rowan v. United States Post Office Dep't, 397 U.S. 729 (1970) (upholding the statutory right of an addressee to compel a mailer of erotic material to remove addressee's name from a mailing list and halt all future mailings); Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding a regulation against loud and raucous broadcasts from a sound truck

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7/ Obscenity is not considered constitutionally-protected speech. Roth v. United States, 354 U.S. 476 (1957). Therefore, any restriction on broadcasting obscene advertisements would be constitutional.

because an individual in the home would otherwise be helpless to escape the noise).

Sanctioning broadcasters' refusals to carry obscene or indecent political advertisements would serve these significant government interests. The government could not assure fair and even-handed application of its criminal laws if it prosecuted broadcasters for advertisements they were forced to carry or if it enabled individuals to bypass restrictions upon broadcasting certain material by qualifying as candidates for public office.[8/] It also could not serve the interests of its obscenity and indecency prohibitions without enabling broadcasters to refuse certain advertisements. A prior warning or a subsequent discussion of the broadcaster's disagreement with the candidates' advertising techniques would not always enable an individual to avoid unwanted intrusions into the home. Moreover, such tactics would not always protect children from obscene, indecent or patently offensive programming or enable parents to discern the programming that their children should watch. This is particularly true in the case of advertisements, where schedules are not typically known to viewers and listeners. Even channelling such programming to late-night hours will not protect the sick child watching TV in the middle of the night or protect other vulnerable viewers, such as parents who

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8/ A review of the materials submitted by LTBC in response to the complaint lodged against it by the Baton Rouge mayoral candidate demonstrates that this is not a theoretical or insubstantial concern.

have miscarried a child and would be unusually sensitive to the graphic depictions of aborted fetuses and fetal parts that are contained in the ads LTBC rejected.

Finally, the government action that sanctioned a ban of a narrow class of political advertising would leave ample alternative avenues for communication of candidates' ideas. Alternative avenues would include distributing literature, showing films at public gatherings, or even broadcasting political advertisements over other media outlets (e.g., cable or MMDS). Moreover, candidates could communicate the same message via broadcast political advertisements, as long as they did not use obscene, indecent or other methods which could violate the criminal law.

III. The WDAY Decision and Rationale Offers No Solution to the Conflict Between Sections 315(a) and 312(a)(6).

Although there is a superficial appeal to the notion that the Supreme Court's decision in the WDAY case[9/] can be used to resolve the conflict broadcasters now face, the rationale of that decision is not available for application here. WDAY relieved broadcasters of liability from state libel laws arising from the compelled broadcast of political messages under Section 315(a) which the broadcaster was forbidden to censor under that section. Such immunity served the basic purposes of Section 315 without derogating from other compelling federal statutory interests.

9/ Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525 (1959).

What WDAY has not resolved is the present dilemma which arises out of the fact that in the Communications Act, Congress itself has spoken inconsistently with respect to the protection to be accorded indecent or obscene political speech. It cannot be said on the one hand that Congress intended broadcasters to be relieved of potential criminal liability (or potential loss of license) for airing obscene or indecent speech, and for the public to be exposed to such material, in order to carry uncensored political messages, or, on the other hand, that it intended to allow licensee restrictions on the broadcast of such programming, even at the cost of limiting to some degree access to the medium for uncensored political messages. Without clear Congressional guidance, the Commission's duty, if possible, is to give meaning both to the expressed Congressional antipathy to the broadcast of indecent or obscene programming and to the purpose of 315 "to develop broadcasting as a political outlet." WDAY, 360 U.S. at 535.

Merely making broadcasters immune from criminal liability, following the model of the WDAY decision, only advances the political prong of Section 315, while emptying Section 312(a)(6) and 18 U.S.C. § 1464 of their basic principle that obscene or indecent "utterances are no essential part of any expression of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." FCC v. Pacifica Foundation, 438 U.S. at 748 (quoting Chaplinsky v. New Hampshire,

315 U.S. 568, 572 (1942)); cf. Cantwell v. Connecticut, 310 U.S. 296, 309-310 (1940).

IV. The Commission Should Respect Licensee Discretion to Accept or Reject Political Advertising Messages That Fall Within the Prescriptions of Section 312(a)(6).

The least restrictive means, in the broadcast context, to achieve the important societal interest in controlling indecent speech and advancing political speech is to leave decisions regarding such matters to the reasonable good faith judgment of individual broadcast licensees. As the Supreme Court has noted, "Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard." Columbia Broadcasting System, Inc. v. Democratic Committee, 412 U.S. 94, 120 (1973).

Given that broadcasting itself is protected by the First Amendment (see United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)) and that the FCC itself is prohibited from engaging in censorship, Section 326 of the Communications Act, the delicate balance called for to decide whether political advertisements may raise serious questions of criminality should be left in the first instance to the journalistic judgment of individual broadcast licensees. While the potential for error by any individual licensee with respect to a particular political message is always present, such possible error should be confined to the non-

governmental bias of a sole licensee which is subject to broad accountability at license renewal as well as to competition at the local level and its standing in its community.[10/] Simply put, the risk of error should best be placed with the entity that has the least power to do the greatest harm. The specter of governmental control of political messages is simply too great a risk for society to run notwithstanding the possibility that any individual licensee may be also infected with bias or prejudice.

In addition, allowing local broadcasters to make such decisions would give appropriate recognition to the invasive and ubiquitous nature of free radio and TV. The local licensee is more likely to be sensitive to the degree of nuisance ("a pig in the parlor," FCC v. Pacifica Foundation, 438 U.S. at 750) that indecent messages can pose in its community, and to weigh that nuisance against the need and opportunity for such a "pig" to be displayed on a particular media outlet or elsewhere.

The benefit of retaining at the local level decisions regarding the acceptability of political broadcast ads that raise questions of criminality is enhanced by the review that can be undertaken of such decisions without the specter of improper governmental control or censorship. The good faith exercise of licensee discretion can be measured through tests which are well

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10/ It must be noted that in the case of LTBC, its ownership and management is closely tied, over a long period of time, with its community of license. See Exhibit A hereto.

known and through a process which is familiar to the Commission. Some of these would include, inter alia, the following:

a. The decision to accept or reject an ad must be politically neutral, not designed to aid or hinder a party or a candidacy for public office. There must be no evidence that the decision to ban an ad is a pretext to aid or hinder the candidacy of any individual.

b. The decision should reflect viewpoint neutrality, made not to suppress the expression of a particular point of view regarding a public issue but designed only to eliminate the possibility that the broadcast facility will be used in a manner contrary to applicable criminal statutes. This test can be measured by the extent to which the licensee allows the same, if less graphic, viewpoint to be aired on its facility through other ads, discussion programs, editorials, or other programming. See n.5 supra.

c. The decision should be explainable on the grounds that it is necessary to protect important elements in the community or the station itself from charges of engaging in illegal activity or to protect children or other vulnerable listeners who otherwise would be unnecessarily exposed to substantial damage or harm from such use of the media. In the present controversy involving LTBC, it was in possession of substantial information from the community and expert psychiatric opinion that broadcast of graphic depictions of an aborted fetus and fetal parts could have a severe impact upon the community, including its children.

d. The decision ought not to be inconsistent with relevant controlling FCC or judicial precedent. Any licensee who undertakes to suppress political advertisements must be held to a heavy burden of justification if that decision is inconsistent with judicial or administrative rulings to the contrary. While this would not preclude a licensee from refusing to carry a political ad for new or novel reasons, it would place a burden on such a licensee to explain its decision in greater detail than otherwise

might be the case. Under this criterion, the licensee would be obliged to explain that its decision was not based upon an arbitrary and idiosyncratic view of the particular controversy, but represented a genuine attempt to protect the public interest without regard to its own political views.

e. Finally, a decision to ban a particular ad because it may constitute an illegal attempt to use the media or may result in substantial harm should be accompanied by evidence that such a ban might be ameliorated by access to other media or forums and would not therefore have a substantial and irreparable impact upon the integrity of the political process and the maintenance of public dialogue during the electoral season.

In the context of reviewing complaints regarding alleged slanting of the news, the Commission has adopted a policy that it will not act as a national news censor. Because of the sensitive First Amendment implications involved in government review of the thousands of editorial decisions that licensees must make every day regarding coverage of the news, the Commission has held that it will "eschew the censors role, including efforts to establish news distortion in situations where Government intervention would constitute a worse danger than the possible rigging itself." Hunger in America, 17 R.R.2d (P&F) 674, 684 (1969). If evidence is present that the licensee itself has undertaken, organized, or directed an effort to slant the news, the Commission will use its regulatory powers to review the licensee's control over the facility. That process, however, will not necessarily be triggered by an asserted disagreement with the good faith judgment of the licensee that particular journalistic presentations are or are not

appropriate. LTBC urges that essentially the same approach be adopted by the Commission in reviewing the decisions of licensees to refuse to carry certain political ads that they believe may be contrary to other requirements of the Communications Act. Confining the Commission to oversight of the licensee's good faith and reasonable exercise of discretion is the appropriate balance of interests. First Amendment rights of broadcasters, the interests of viewers, and the important goal of confining the FCC to the most narrow and least intrusive role in political programming matters demands such a constricted government role.

A further justification for such a narrow FCC role in the process is present by virtue of the chilling effect that expansive FCC review of the refusal to carry a political message can have upon licensee's journalistic and programming decisions.[11/] Just as complaints to the FCC by government agencies can have a chilling effect on a licensee's exercise of its responsibilities (see Central Intelligence Agency, 58 R.R.2d (P&F) 1544 (1985)), de novo review, not for reasonableness but for substitution of judgment by the government itself, of a complaint that a candidate for public office has improperly been denied the right to air its message on a station can have a severe chilling effect upon the First

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11/ As with the Fairness Doctrine, the unintended consequence of mandated access to the media may result in less political broadcasting messages because of the chilling effect of governmental oversight. See Fairness Doctrine Report, 102 F.C.C.2d 145 (1985); Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

Amendment rights of licensees. The prospect that political candidates may themselves some day be in a position to exercise jurisdiction over the license upon which a demand for air time has been made and declined is sufficiently threatening as to intimidate even the most courageous of broadcasters. Add to that mix that the licensee may be held strictly accountable by a government agency which itself is or may be beholden to the candidate, there is presented a situation where few licensees will be found who will discharge their responsibilities undaunted, even when confronted with political advertising messages that raise serious questions.

Finally, deferring to the reasonable good faith discretion of licensees has been emphasized by the Supreme Court as a principal means of guarding against "the risk of an enlargement of Government control over the content of broadcast discussion of public issues." CBS, Inc. v. Democratic National Committee, 412 U.S. at 110. This approach has been specifically approved by the Supreme Court as properly balancing "the First Amendment rights of federal candidates, the public, and broadcasters" when it reviewed the Commission's procedure for enforcement of federal candidates' requests for reasonable access under Section 312(a)(7).[12/]

12/ "The Commission has stated that, in enforcing the statute, it will 'provide leeway to broadcasters and not merely attempt de novo to determine the reasonableness of their judgments. . .' 74 F.C.C.2d at 672. If broadcasters have considered the relevant factors in good faith, the Commission will uphold their decisions." CBS, Inc. v. FCC, 453 U.S. 367, 396-97 (1981); see also decision below, CBS, Inc. v. FCC, 629 F.2d 1, 25 n.117 & 29 (D.C. Cir. 1980) (Tamm, J., concurring at 29). Restrained governmental review of the exercise of journalistic discretion by the electronic media serves the same key First Amendment interests safeguarded to print

V. In Establishing the Scope of Licensee Discretion to Review and Air Indecent or Obscene Political Advertisements, No Distinction Should Be Made Between Ads Which are Presented for Federal or Non-Federal Candidates.

Section 312(a)(7) of the Communications Act extends to federal candidates a "reasonable" right of access to the media for broadcast of messages on their behalf. No similar right of access is found within the Communications Act for non-federal candidates, other than what may be derived from the general public interest obligation of licensees to make their facilities available for the discussion of public issues, including coverage of political campaigns on behalf of local or state candidates. The slightly different treatment between federal and non-federal candidates invites an inquiry as to whether that different treatment can be a basis for permitting or restricting licensees from accepting or rejecting a political ad which may contain obscene or indecent material. LTBC believes, however, that these distinctions are immaterial and that the Commission should not enact or extend any different right or obligation to candidates or licensees with respect to treatment of such issues.

On the one hand, the word "reasonable" in Section 312(a)(7) can be interpreted to mean a right of access that is limited to use of the media for non-criminal purposes - access to engage in

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journalists under New York Times Company v. Sullivan, 376 U.S. 254 (1964).